Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of	)	
the Cable Communications Policy Act of 1984	)	MB Docket No. 05-311
as amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

COMMENTS OF MANATEE COUNTY, FLORIDA

These Comments are filed by Manatee County, Florida in support of the comments filed by the National Association of Counties, National League of Cities, National Association of Telecommunications Officers and Advisors, and other similar comments. It is the position of Manatee County, as expressed through its duly-elected Board of County Commissioners, that local governments are the best entities to ensure the proper issuance of cable franchises for new entrants into the video services field on a timely basis, while ensuring the Congressionally-stated policy goals, including responsiveness to local community needs. In support of this position, it wishes to inform the Commission about the recent history of cable television franchising in its jurisdiction, and to respond to certain positions taken and questions posed by the Commission in its Notice of Proposed Rulemaking of November 18, 2005.

Cable Franchising in Our Community

Community Information

Manatee County is one of Florida's most fast-growing counties. Currently, its population stands at around 313,000 persons. The largest city in the County is Bradenton, with a population of approximately 51,000. It is followed by the City of Palmetto, with an approximate population of 13,000. There are also several small beach towns including Bradenton Beach, Holmes Beach, Anna Maria and Longboat Key, with a collective population of around 10,000. Each of these municipalities acts as their own local franchising authority, but with the vast majority of citizens currently living in unincorporated parts of the County, Manatee County government is the most significant franchising authority for the County. As of January 1, 2005, there were 125,359 households in the County, and 104,311 cable subscribers across all providers. Unincorporated Manatee County accounted for approximately 78,000 of those subscribers. The County currently franchises Comcast, Bright House Networks, Universal Cablevision, Strategic Technologies, Inc., and Verizon to construct and operate cable television systems within its jurisdiction. The County has been a franchising authority since the initial adoption of the Cable Act.

Our Current Franchisees

As noted, the County has franchise agreements with several cable television providers. A brief review of each provider follows:

Bright House Networks

Bright House Networks is the dominant cable television provider in the entire greater Tampa Bay area, and is also the dominant provider in Manatee County. It is the successor entity to the old Time Warner that served much of the greater Tampa Bay region for decades. In 2005 it was the sole wire-line cable provider within the County's various municipalities except Longboat Key, and accounted for over 73,000 subscribers in the unincorporated County. Its most recent franchise with Manatee County was granted in 1993. As the Commission knows, Bright House Networks' various cable systems are all owned by the media publishing company Advance Newhouse. Advance Newhouse operates its various Bright House-branded cable systems through various regional Divisions. Its Manatee system is operated by Bright House Networks, Tampa Bay Division. In the industry publication Multichannel News' most recent annual review of the Nation's top 100 cable systems, Bright House Networks, Tampa Bay Division, ranked 11th overall with well over one million subscribers. In the County's service area, Bright House operates a system which currently provides a channel capacity (programmed or not) of hundreds of channels. As does its competitors, Bright House generally actively engages in system, product and service enhancements, such as rolling out digital capacity, video on demand products, locally-focused programming and a voice product to compete with traditional phone companies. The County has thus had little concern over the years that Bright House possesses the legal, technical and financial ability to operate a cable television system within the County.

Like many cable providers, Bright House Tampa Bay has raised its cable rates in Manatee County steadily over the years. In discussing Bright House's 2005 rate increase with local media, its spokesperson attributed the increase to the operator's programming/operational costs, with no mention of franchise costs. Bright House had been negotiating with Manatee County during 2004-05 to renew its franchise. After the County granted Verizon its franchise, Bright House invoked its right to the formal franchise renewal process. The Parties are currently in the midst of those negotiations and it is hoped that a new agreement will be reached which complies with Florida's level playing field statute and addresses access channel and institutional network support in an acceptable manner.

Comcast

As the Commission is aware, Comcast is the Nation's largest cable television company. In February of 2005, Comcast announced a profit increase of over 10% on revenue of $20.3 billion and net earnings of $970 million. Comcast has historically been the dominant cable provider to Sarasota County, the county to the immediate south of Manatee County on Florida's west coast. However, until Comcast purchased the former U.S. Cable system operated in Manatee County, its presence in the County was negligible. Currently, Comcast's Manatee County system is operated by Comcast West Florida, Inc., and serves roughly 8,000 subscribers in the County. In Multichannel News' 2005 annual review of the Nation's top 100 cable systems, Comcast West

Florida ranked 64th overall. In the Manatee County service area, Comcast West Florida operates a system which currently provides a revealed channel capacity (programmed or not) of 905 channels. In areas outside of the Tara community in Manatee County (discussed in detail later in these Comments) Comcast generally actively engages in system, product and service enhancements, such as rolling out digital capacity, video on demand products, and a voice product to compete with traditional phone companies.

Comcast West Florida has also raised its cable rates steadily over the years. In discussing Comcast West Florida's 2005 rate increase with local media, its area vice president attributed the increase to the system's purchase of new technologies and products and even increased gasoline prices. In the same article, the spokesman for Bright House attributed the cost cable operators must pay for the content they air as the number one factor in cable bill increases. Comcast's current franchise was granted in 1993 and it has also been involved in renewal discussions with the County, though it has not invoked the formal renewal process.

Universal Cablevision

Universal Cablevision is a small operator in unincorporated Manatee County, serving only some 800 homes. Its current franchise expires in 2008 with the possibility of extension to 2010. The County is not currently engaged in franchise renewal discussions with Universal Cablevision.

Strategic Technologies, Inc.

Before the year 2000, Manatee County had been served by several providers operating under "legacy" franchise agreements, all of which had no build out requirements, and otherwise failed to address the promotion of competition in any meaningful way. As a result, at the dawn of 2000, though numerous providers were operating in the County, they largely avoided direct house to house competition with each other. In 2000, Strategic Technologies, Inc. (STI) made application for a franchise within the County. It originally expressed no interest in competing against any other provider, only requesting a franchise to serve a newly-developing large housing community being built by Lennar Homes (STI is that homebuilder's subsidiary and its plan was to strike an exclusive bulk agreement with its parent developer, thus ensuring 100% penetration as the development built out). However, since the granting of the franchise, as requested by STI, did not serve the desire of the County to obtain direct, house to house competition, STI was required to build its system so that it directly competed with the dominant provider. However, the County also took into account the expense of requiring a full build out of the entire County and thus crafted a unique, phased build out plan for STI. It would build its system out to all populated areas within a 3 mile radius of its head end by a certain date, and would be required to market its new product to individual households. If a certain defined penetration rate were realized after the initial phase, STI would be required to construct a second, concentric ring going out another 3 miles from its head end. The County felt this was a balanced approach to try to create a competitive market within at least a portion of the County, without imposing undue construction costs on the new entrant.

The County also realized, with the entry of STI into its cable community, that the old system of lump sum monetary payments for access channel support needed to be re-examined in light of the differing sizes and financial capabilities of the various providers who would need to renew in the coming decade, and to move toward a more fair share system. The STI agreement, therefore, provided for two lump sum payments (one in the first year and one in the fourth), but also instituted, for the first time in the County, a per-subscriber support amount to be used for access channel staffing. STI obtained its 10 year franchise from the County Commission in 2001.

During the STI franchising and subsequent build out process, the dominant provider strongly opposed the encroachment into neighborhoods it once served unchallenged. When STI began marketing its services to these households, the dominant provider countered by approaching the neighborhood to offer an exclusive bulk agreement at rates far lower than individual homeowners were then paying, and offered to purchase the STI system from STI. From the County's regulatory viewpoint, these developments clearly demonstrated that direct competition could result in better consumer pricing. Indeed, Manatee County had desired direct competition in part by witnessing the experience of its neighboring county to the north, Pinellas County. In that community, two providers (one dominant [Bright House] and one overbuilder [Knology]) had competed head to head in much of that County's area and the result, even with the overbuilder only possessing under 20% of the subscriber base, was that cable prices in Pinellas are significantly lower than in the surrounding counties where direct wire line competition does not exist. Indeed, in local newspaper coverage on December 30, 2005 (Sarasota Herald Tribune & St. Pete Times), of Bright House's 2006 rate increases, it is noted that Bright House charges digital customers $ 58.45 in Manatee and Hillsborough Counties, but only $ 48.85 in Pinellas for the same service. Bright House charged its Manatee and Hillsborough standard analog subscribers $ 46.49 in 2005, while Pinellas County standard analog Bright House customers only paid $ 31.95 for the same service, a $14.54 difference. Of note, the availability of satellite cable was no different in Pinellas County than it was in Manatee or Hillsborough Counties during the relevant period, undermining the wire line industry's assertions that satellite offered true competition, and further demonstrating that the an LFA's use of local authority to create direct, head to head competition among *wire line* providers can make a market difference.

Unfortunately for Manatee County's competitive marketplace, STI formally informed the County on December 14, 2005, that it had finally agreed to sell its system to the County's dominant provider, and would thus cease operations in 2006. The County is hopeful that this void in direct competition will be filled as Verizon completes the construction of its system, which will compete against the dominant provider in many of the populated areas of the County. In any event, the County will continue to employ some version of the phased build out requirement for new applicants in the future for any areas not already served by at least two wire line providers with the policy goal that a majority of County homes will have a choice of wire line providers.

Verizon

Manatee County's newest cable television franchise has been issued to Verizon. Verizon's franchise was granted on August 30, 2005, and has a term of 15 years. As the Commission knows, Verizon, and other traditional telephone companies, have been rolling out a video product to counter traditional cable companies' entry into telephony. Verizon representatives visited with the County in the winter of 2004 to do a presentation of its new fiber to the premises system. It submitted its first draft proposal for a franchise in November of 2004. Since, as a phone company, Verizon had the legal right to begin its system construction upgrades regardless of its franchise status, the County worked with Verizon representatives to create a streamlined permitting and inspection process which would allow the County's Right of Way Manager and his staff to ensure public safety and construction standards were met while not creating needless administrative hoops for Verizon's contractors. In January of 2005, the County and Verizon entered into a memorandum of understanding concerning its system construction adopting a streamlined permitting and inspection regime which continues to be working well, with relatively few construction mishaps given the project's scope. The dominant provider did file two complaints against Verizon when its lines were cut by Verizon contractors but each was examined by the County and Verizon was not found to have acted in bad faith in either incident and quickly moved to repair the damage. Verizon was not required to pay build permit fees since, under Florida's Communications Tax Simplification Act, most local jurisdictions including Manatee County elected to forego the authority to charge such fees from providers in exchange for a small enhancement in their base rate.

The County transmitted its own version of a franchise agreement to Verizon in February of 2005 in an effort to address level playing field issues caused by Verizon's original proposal. In the ensuing months, the Parties worked to resolve differences and address the concerns of each other. During this same time frame, the County was working on an extensive revision of its cable ordinance (described in more detail below). All providers, including Verizon, were permitted to participate in this process as well. By the end of July, 2005, the Parties had reached agreed terms and the franchise was ready for County Commission consideration.

During the negotiation process, several issues were present which caused the need for detailed negotiations. The County asks the Commission to carefully consider these as they reveal that LFAs are not always the sole cause for the need for longer franchise negotiations. One of the first items that had to be dealt with was that Verizon presented the County with a draft franchise that was basically a mirror of the agreement it had negotiated with a Texas municipality (Verizon's first franchise in the Nation). Its position was that Verizon desired all of its franchises to look like the Texas franchise. While the County understood the desire for a corporate-wide agreement, it felt that Verizon was not understanding that the County was under a statutory duty to maintain a level playing field, thus causing it to present Verizon with a franchise proposal which looked similar to the franchise it had most recently granted to STI. While the County ultimately was able to work with Verizon's draft, after significant modifications, this issue caused the process to be somewhat longer than otherwise would have been needed. It should be noted, however, that from first proposal to grant, Verizon was awarded its franchise approximately two months *faster* than the process took STI in 2000-01.

The next issue of significance that took several negotiation sessions and email exchanges to resolve was how the franchise would accommodate for the fact that Verizon's system would be operating as a traditional, state and federally-regulated phone system as well as a locally-regulated cable system. While Verizon's attorneys were instructed to safeguard the concept that its phone assets were not being subjected to local regulation, the County needed to ensure that Verizon's sale and delivery of its cable television product would comply with locally important standards of customer service and system performance. Again, the unique regulatory melding of phone company and cable television provider, while ultimately resolved, took some careful thought on both sides.

The final issue of significance the Parties needed to spend significant time on was the need for competition and red-lining prevention. As noted herein, the policy of Manatee County (and of Congress) is to seek a competitive cable television market and to utilize the cable franchising process to advance that aim wherever possible. Verizon initially resisted a required build out requirement, though its stated plans included possible, eventual coverage of most of the County, depending on its success in the market. However, the County desired to have at least some level of guarantee that Verizon would provide coverage to a significant portion of the County's population, and that it would construct its system in areas of high income residents and modest income alike. Part of the process of addressing this issue was the need for County officials to understand the method Verizon is using to construct its system since unlike traditional cable companies which build from "a headend" Verizon is building from each of its several "call centers" within the County. These call centers do not respect jurisdictional lines but are instead driven by technological capacity, natural barriers and redundancy capability. After much discussion and negotiation, Verizon agreed upon a two phase build out wherein it must construct the first phase within a year and the second within five. Both the initial and second phase build out will include passing homes in both well off and lower income neighborhoods.

While Verizon and the County also spent considerable time reviewing the County's proposed package of "business terms" (access channel allocation and support, and institutional network support), Verizon did not significantly resist the concept of local tailoring of these, and only sought to satisfy itself that the requested levels of support were supported by law and supported by specific information from the County concerning the community's current and future cable-related needs. In fact, Verizon became the first franchisee to award a second education access channel, beginning in 2007, which is intended to serve as conduit for programming from the Manatee County School District being funded and planned so as to be ready to air by then.

On August 16th the County Commission adopted the new cable ordinance and also heard discussions on the Verizon franchise, as well as the franchise renewal efforts of Bright House and Comcast. After providing additional guidance to its staff on its policy positions, the County Commission granted Verizon its franchise after a public hearing on August 30, 2005. Verizon is now fully legally authorized to provide cable television services to County residents. According to officials with the City of Bradenton, Verizon is also near being awarded a franchise in that city as well, thus ensuring the availability of Verizon's service offering for a majority of Manatee County residents.

The Franchising Regime in Florida and Manatee County

Federal and State Law:

Manatee County is empowered by the cable television regulations of Title 47 of the United States Code to act as a Local Franchising Authority (LFA) with all of the powers and authority that status provides, including but not limited to negotiating and granting cable television franchises. The public policy of the United States of America, as expressed in 47 U.S.C. § 521, is that cable television regulations should include franchise procedures and standards which encourage the growth and development of cable systems and assure that cable systems are responsive to the needs and interests of the local community; and should promote competition in cable communications and minimize unnecessary regulation of cable systems. Pursuant to 47 U.S.C. § 541(a)(1), an LFA may not unreasonably refuse to award a competitive cable television franchise.

The public policy of the State of Florida, as expressed in Florida Statutes § 166.046(3), is that cable television Franchising Authorities should grant overlapping franchises under terms and conditions which are not more favorable or less burdensome than those of other franchises. Section 166.046(5) of that same statute, however, provides that "Nothing in this section shall be construed to prevent any...county considering the approval of an additional cable service franchise in all or any part of the area of such...county from imposing additional terms and conditions upon the granting of such franchise as such...county shall in its sole discretion deem necessary or appropriate." Florida law also requires that no local government may grant a cable franchise unless it does so after holding a public hearing in which it considers the economic impact upon private property, the public need for the franchise, the capacity of the public rights of way to accommodate the system, the present and future use of the public rights of way to be uses by the cable system, the potential disruption to existing users of the rights of way, the financial ability of the franchise applicant to perform, societal interests generally considered in cable television franchising, and any other substantive or procedural matters which may be relevant to consider. Florida Statute § 166.046(2).

As to franchise renewals, 47 U.S.C. § 546 provides for a formal renewal process which would include formal procedures by the County Commission and could, if the County Commission were to make a preliminary assessment that a franchise should not be renewed, result in an administrative hearing process, after which the Commission would make a final renewal determination. Subdivision (h) of the statute also provides, however, for an informal renewal process where the parties may simply negotiate a new agreement. During a renewal process, LFAs are entitled to ask the franchisee to submit proposals for how its system would be upgraded, and examine, in light of community needs, the quality of the franchisee's service, including signal quality, response to consumer complaints, and billing practices. LFAs also examine a franchisee's proposals to reasonably meet the future cable-related community needs and interests, while taking into account the cost of meeting such needs and interests and the State law level playing field requirements. LFAs may not, however, take into account a franchisee's programming mix or the quality of programming since LFAs don't have regulatory authority over programming content. Section 2-7-7 of Manatee County's newly-adopted cable ordinance elaborates on the renewal process and procedures.

With respect to payments by a franchisee, the Cable Act permits LFAs to collect up to 5% of gross revenues from cable providers as compensation for the use of public rights-of-way. Prior to the year 2000, Florida LFAs were able to directly set and collect franchise fees from cable television providers. However, while this authority still exists in federal law, in 2001 the State of Florida adopted Florida Statutes § 202.13(3), § 202.20(2)(b)(1)(b), and § 202.24(1) (collectively a part of the Florida Communications Services Tax (CST) Simplification Act), which superseded and preempted the authority of municipalities and counties in Florida to directly levy or collect cable television franchise fees. Under the current system, providers of cable, phone and other communications services remit the communications tax directly to the Florida Department of Revenue, which takes an administrative fee and remits the rest to the various LFAs. Rates were established by the State for each taxing jurisdiction based upon historical revenues under prior franchise fee and taxing schemes with the intent that the jurisdictions would not receive net returns significantly different than they received collectively from the prior distinct funding sources.

In addition to the franchise fee (in Florida the CST), the Cable Act, at 47 U.S.C. § 531, authorizes LFAs to establish requirements in franchises concerning channel capacity for government and education access programming, and 47 U.S.C. § 541(a)(4)(B), an LFA may require assurances that the cable provider will provide adequate educational and government access "channel capacity, facilities, and financial support." Sections 531 and 541 also authorize LFAs to require the provision of an Institutional Network (I-net) as a condition of an initial grant or renewal. While the Legislature removed the authority of LFAs to directly collect franchise fees as payment for use and burden on the right-of-way, it specifically left these other items in local hands. Specifically, pursuant to Florida Statute § 202.24(2)(a)(3) and (2)(c)(8), and § 337.401(3)(a)(2), each Florida municipality and county retains the right and authority to negotiate all other terms and conditions of a cable television franchise, including the provision of in-kind requirements, institutional networks, and contributions for or in support of educational or governmental access channels.

Local Law:

The arrival of Verizon as a cable television franchise applicant, as well as changes in Florida law concerning local franchising, caused Manatee County to recognize that its then-existing cable ordinance was not in the best shape to effectively and efficiently deal with core issues of most importance to the County, while also complying with all applicable superior laws. The County also wanted to move many items traditionally dealt with in an individual franchise, such as insurance and construction issues, into an ordinance so as to ensure uniform applicability to all providers, and avoid the need to individually negotiate these points with each franchisee. Therefore, during 2004-05, the County revised its cable ordinance significantly. Prior to final adoption, the County's various cable providers, as well as Verizon, were permitted extensive comment periods, revision meetings, and the ability to appear at the public hearing to adopt the new ordinance. After this process, the County Commission adopted Ordinance 05-50 on August 16, 2005. This ordinance created a new Chapter 2-7, Communications Services Providers, and may be viewed at:

http://library2.municode.com/mcc/home.htm?infobase=10428&doc_method=cleardoc

The County's new ordinance of course incorporates the various requirements of the federal Cable Act concerning the process for franchise applications, renewals and denials. However, it also incorporates various matters of vital importance to the County. First, the ordinance attempts to be forward-looking to a time when counties and municipalities may be forced to work together in the franchising effort. Thus, § 2-7-2(b) and § 2-7-26 make provision for the County and its municipalities to enter into an interlocal agreement to establish a cable consortium which would become the LFA for the entire County under uniform regulations, making the process of negotiation easier for providers. While the County explored such a consortium with its municipalities on a voluntary basis in 2005, current political considerations as well as uncertainty over how the State's Level Playing Field Act would impact the consortium's franchising authority caused the effort to die. Nevertheless, the County believes local/regional consortiums with proportional political representation and full franchising authority can be an effective way to help ease costs, delays and regulatory differences during franchise negotiations, particularly for new entrants.

The new ordinance also removed application requirements, such as programming information, since LFAs do not have regulatory authority over content in any event. Additionally, application fees were removed to reduce barriers to entry for smaller providers. Franchise sales/transfers reviews were also made less burdensome by the recognition of certain transfers as not triggering the need for LFA review. The new ordinance significantly pared down minimum construction and system requirements to matters important on the local level, such as requirements for PEG access interconnection among providers, indemnification of LFA for provider negligence, and the need for emergency override authority in this hurricane-prone jurisdiction. The construction issues dealt with target specific issues which history has demonstrated are particular concerns for cable system construction, such as sidewalk and landscape repair/replacement, undergrounding and trench-sharing issues, and tree trimming.

The new ordinance provides general authority to require adequate insurance, as well as letters of credit, performance bonds or other similar tools intended to ensure the provider is financially able to respond to injury to the public and to complete its system build obligations.

The ordinance provides requirements for customer service, including the County's role in tracking and mediating disputes with customers and customized provisions concerning adequate service to our area's significant Spanish speaking citizens. The ordinance incorporates federal requirements concerning customer privacy, as permitted by the Cable Act.

In the area of access channels, the ordinance makes general provision for authority to require government and education access channel allocations of franchisees. In light of First Amendment case law, Manatee County does not participate in nor require channel allocation for public access programming. Provision is made for unused capacity, and the ordinance permits placement of access channels on other than the basic tier, looking ahead to the day when the Congress authorizes such channels to be placed in tiers other than "the most basic tier", which often stands in the way of providers being more willing to grant additional access channels. Manatee County believes that the "most basic tier" requirement of federal law, especially for additional access channels above 1 government and 1 education access channel, creates an outdated barrier to allowing the growing number of subscribers with digital access from being able to have more access to these local information sources, and desires Congress give LFAs the authority to negotiate the placement of added access channel capacity in higher tiers, or on alternative delivery platforms, such as on demand.

Perhaps the most significant provision of the new ordinance is § 2-7-4, entitled Competition and Consumer Choice; Discrimination Prohibited. This section contains provisions which note that

Manatee County desires direct wire-line cable competition, and that it may require providers and franchise applicants to take steps to help achieve this goal. The ordinance does not attempt to establish a one size fits approach to obtaining competition, but leaves that to franchise negotiations which will reflect the marketplace as each application for grant or renewal of a franchise comes to the County over time. In particular, while Manatee County does not require a "universal service" buildout from all providers, it reserves the right to require some buildout beyond what an applicant desires so as to obtain overlapping competition in most of the densely-populated areas of the County.

The other major provision of this section attempts to address the growing problem of competition in planned communities. The FCC, in its First Order on Reconsideration and Second Report and Order on ***In the Matter of Telecommunications Services Inside Wiring, et seq.*****, FCC 03-9, CS Dkt. No. 95-184 (January 21, 2003)**, found "that the record is inconclusive regarding anti-competitive effects of exclusive and perpetual contracts..." **Id., at pg. 24, ¶ 60**, and thus that "the record does not support a prohibition on exclusive contracts for video services in MDUs, nor a time limit, in the nature of a cap, for such contracts." **Id., at pg. 29, ¶ 71**. However, Manatee County agrees with the comments of various competitive providers, reviewed in that Order, that exclusive agreements should, if permitted at all, be for "very short caps of three to five years" which would be "sufficient time for MVPD's to recoup their investments in MDUs." **Id., at pg. 27, ¶ 66**. While the discussion in that Order centered more on condominium buildings, the overall nature of the debate on exclusive agreements must begin to take into account how planned community development and the exclusive bulk agreements they often strike, are harming wire-line cable competition. Indeed, the Florida Senate's Committee on Communications & Public Utilities Interim Project 2005-106, entitled *Review of Access by Communications Companies to Customers in Multi-tenant Environments*, is studying various aspects of this issue, including barriers to competitive access to tenants and their potential effects and remedies. Manatee County offers the Commission its own real world example of the phenomenon, and how it is attempting to address the matter at the local level, within its Congressionally-granted authority as an LFA.

As noted earlier, Manatee County is seeing explosive new growth in residential construction. Much of that new growth comes in the form of planned, gated communities and condominium developments. These living types differ from old, traditional neighborhoods in that they often employ community-wide purchasing agreements for services such as cable television. However, while a community may, in the short run, benefit from an exclusive bulk agreement, such agreements, when written with extensively long terms or automatic renewals, can cause the provider to become complacent over issues such as system upgrades within the community, and can have the market effect of excluding a competing service from offering a superior price and or service to that community. During its public hearings on the state of cable in the County, the Board of County Commissioners heard from representatives of the Tara community in southern Manatee County. Tara is a multi-phased development of upscale homes which has been being developed for over a decade. When first developed, Tara entered into a long-term agreement with U.S. Cable. As the years passed, U.S. Cable failed to update its system in Tara since it had the community locked into an agreement. It should be noted that while it is often argued by those opposed to caps on the terms of exclusive agreements that the residents freely choose these deals, it is often a developer who strikes an agreement that will not impact that developer once the development is completed. In March of 2004, the U.S. Cable system serving Tara was transferred to Comcast. Yet in spite of Comcast being the largest provider of cable service in the Nation with significant resources at hand, the residents of Tara were told that if they desired system upgrades to permit services such as high speed data and digital quality, they would need to sign another long term agreement with Comcast. Otherwise, their system would remain antiquated. The County Commissioners heard testimony that this situation is not unique to Tara but can occur in many similar communities within the County.

In response to this barrier to competition, the County Commission's new ordinance creates a prohibition against any of its franchisees entering exclusive bulk agreements with condominium or homeowner associations for periods of more than 5 years. The County Commission felt that this provision would permit providers to recover hardware investment while allowing the planned community served by the provider to review its price and service every 5 years, and allow a new entrant, such as Verizon in the case of Manatee County, to offer an even more competitive deal. This provision would also help ensure that the community was served by the latest technological advances as they develop, thus avoiding future "Taras" where a community of residents were stuck with outdated technological systems. This provision may not need to exist in many localities where there is only one provider or where planned communities are not a significant element of the local cable market. But it clearly is a rationally based attempt by the County to enhance the opportunity for competition within its local market, especially for new market entrants, and is thus a clear example of the type of customized local action Congress envisioned to address specific and unique local market forces. Any attempt by the FCC to constrain LFAs from implementing such provisions, which in fact could become models for other areas to follow.

Responses/Comments to the Notice of Proposed Rulemaking

Does the FCC Have the Legal Authority to Issue Rules Which Preempt Local Franchising Authorities' Ordinances?

The FCC's NPRM states, in its introduction, that potential competitors seeking to enter the multichannel video programming distributor marketplace have alleged that in many areas the current operation of the local franchising process serves as a barrier to entry, and therefore, the FCC seeks comment on how it should implement 47 U.S.C. § 541(a)(1), which provides that a franchising authority may not unreasonably refuse to award an additional competitive franchise. As an initial matter, Manatee County respectfully asserts that should the FCC attempt to adopt rules which actually or effectively preempt its duly-adopted cable ordinance, such attempt would exceed the Commission's Congressionally-delegated authority, and would indeed conflict with the intent of Congress.

While the NPRM at first makes reference to 47 U.S.C. § 541(a)(1)'s, "unreasonably refuse" language, it goes on to broaden the standard from the statutory phrase, thus creating a broader question the FCC seeks to have comment on, but which alters the Congressional phrase "unreasonably refuse." Specifically, the NPRM states,

> The first sentence of [§ 541(a)(1)] states that a franchising authority may award 'one or more franchises' and may not *unreasonably refuse* to award 'an additional competitive franchise.' We tentatively conclude that [§ 541(a)(1)] empowers the Commission to ensure that the local franchising process does not *unreasonably interfere* with the ability of any potential new entrant to provide video programming to consumers. We seek comment on this tentative conclusion.

NPRM at pg. 10, ¶ 16. Emphasis added. In shifting the discussion of the Commission's examination from the Congressional focus of the final act of refusal of a franchise to the 'interference with a new entrant to provide programming,' the NPRM assumes a broader Congressional standard, and FCC mandate, than Congress enacted. As the Commission's own NPRM notes, it was the intent of the Cable Act to "preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects...[and that] the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." NPRM at n. 18, citing, H.R. Rep. No. 98-934 (1984). Congress dealt with the potential problem of those LFAs who may hold a provider's franchise application hostage to the point of actual or probable denial for clearly unreasonable reasons by empowering the impacted provider to seek judicial relief. See, 47 U.S.C. § 555(a). The federal judiciary has always stood ready to enforce § 541(a)(1), even where an actual denial has not occurred. For instance, in ***Quest Broadband Services v. City of Boulder*, 151 F. Supp. 2d 1236 (D. Col. 2001)**, the Court held that the city's ordinance, which required voter approval of any new franchise, was preempted by § 541(a)(1) and granted the needed relief.

What it appears that the FCC seeks is to permit providers to simply circumvent the local negotiation process if it, in its judgment, determines that a local ordinance or franchise requirement "interferes" with the ability to enter a market with a wire-line video product. However, as Congress has consistently recognized, the video markets in this Nation are varied and each application and franchising scheme must be examined individually. A cornerstone of that examination should be a federal deference to the LFA's ability to operate its franchising process to completion (at least where that process does not contain the type of facial conflict found in the ***Boulder*** case) prior to judgment being passed as to that process' reasonable effects. This is exactly how the law was applied by United States District Magistrate Judge Seeborg in August of 2004 when he dismissed a suit Comcast had brought against the City of San Jose, California. In that case, the parties had been negotiating a franchise but Comcast resisted the City's access channel and 'I Net' demands. In January of 2003, the City issued a preliminary denial and began the administrative hearing process but Comcast elected to file suit instead, asserting the support demands created a "chilling effect" and were thus unreasonable. In dismissing the suit as premature, Judge Seeborg found that the City had been following Congressionally established procedural rules concerning denial, and that process, including the local administrative hearing, needed to occur prior to judicial review. Manatee County asserts that this was a proper application of current Congressional law and intent, and one which the FCC should not disturb through any rule absent Congressional direction to do so.

If an LFA and a provider can come to terms, then by definition the local process was reasonable and reasonably applied. If, however, the local process results in a denial of a franchise, then the provider may take the record below to the federal judiciary for its judgment. Any FCC rule which would circumvent this process would be counter to the current express Congressional intent that the franchising process be allowed to take place at the local level and that review for unreasonable final denials take place via judicial review.

The exact nature of authority the FCC is contemplating wielding is hard to discern from the NPRM since the NPRM does not actually propose any specific rules upon which to comment. However, if the FCC contemplates attempting to spell out with greater clarity what may or may not constitute a reasonable denial (again Congress did *not* authorize the FCC to regulate pre-denial "barriers"), Manatee County would welcome some further clarification on that point since this would aid the judiciary in individual cases brought to enforce § 541. However, Congress itself explicitly rejected an effort to insert into the 1992 amendment to § 541 particular grounds for finding refusals to grant the award of a franchise to be reasonable. See, H.R. Rep. No. 102-628, at 9 (1992)(stating that for purposes of § 541, refusal was not unreasonable if based upon such reasons as technical infeasibility, inadequate provision of access channel capacity, facilities or support, or inadequate assurance of universal service in the entire franchise area). While these examples of reasonable reasons for denial did not make their way into the law, they clearly show Congressional thinking on what types of reasons would in fact be reasonable reasons to decline to grant an additional franchise, and they are all factors which the local authorities are uniquely suited to assess. Regardless, Manatee County's review of current federal law does not find a Congressional authorization for the FCC to make rules preempting local laws which are not inconsistent with the Act, nor inserting itself into the local franchise negotiation process, at least at the pre-final denial stage.

The FCC's NPRM states that "as marketplace competition disciplines competitors' behavior, all competing cable service providers could require less federal regulation." As to this basis for asserting the possible need for new rules, it is somewhat incongruous to assert that given market force discipline less federal regulation is needed, in an NPRM contemplating *additional* federal regulations. Also, the argument that market force discipline could bring a need for less *federal* regulation, the NPRM is focused on *local* regulation. Manatee County's main point of response to this assertion, however, concerns the nature of the market the FCC is examining. In the 1980's, as the ***Boulder*** Court noted, "cable providers were generally granted exclusive franchises, resulting in monopolies." ***Boulder*, at 1243**. As a result, Congress passed the Cable Television Consumer Protection and Competition Act of 1992, of which § 541 was a part. The House report on that law stated, in relevant part:

> The Committee believes that steps must be taken to encourage the further development of robust competition in the video programming marketplace....

H.R.Rep. No. 628, 102d Cong, 2d Sess. 44-47 (1992)(discussing § 541). While the FCC could, on a national scale, view many markets as having competition, and while the logical leap could then be made that poor competitors will be dealt with by the market, thus not requiring regulation, the actual operation of the wire-line cable markets in each jurisdiction may vary widely, not lending themselves to uniform FCC opinions concerning the validity of locally-tailored regulations.

For instance, in Manatee County, there are several wire-line cable television providers authorized to conduct business against each other. However, as noted earlier, these providers historically have largely opted not to construct their systems in an overbuild manner, electing instead to acquire exclusive, long term bulk agreements where they can and sitting on these 'fiefdoms.' As Manatee County's review of its local legislation reveals, Manatee County has crafted provisions which seek to ensure, within the limits of the law and tailoring each case individually, that wire-line cable systems seeking to do business in Manatee provide at least some system overbuild so that more of the County's consumers have true choice. Manatee has also crafted provisions attempting to deal with large planned communities which often purchase cable television by way of an exclusive bulk agreement. The FCC's NPRM's market discipline discussion does not make mention of this type of housing development but national development trends (and certainly development trends in the greater Tampa Bay area) clearly show that this is how most home buyers are electing to live. However, this trend, if left unregulated, also will result in less true market discipline since new entrant providers would be hard pressed to justify making infrastructure investment inside the gates of a community which is bound by an exclusive long-term bulk agreement. Manatee County's response to this growing phenomenon, the cap on the length such an agreement could last before needing to be renewed, is its way of attempting to adhere to Congress's stated policy of wanting more competition among providers. This method may work in Manatee but other local governments may devise some different method based on local factors present in their respective markets. This ability of LFAs to tailor local regulations to reach Congressional aims is vital to the continued development of competition and maintenance of service to local needs in the cable television market.

Many in the wire-line cable television industry agree with this position. For instance, in commenting upon the efforts of telephone companies such as SBC and Verizon to gain legislation at the state and federal level which would eliminate local cable franchising authority, Comcast's Executive Vice President, David Cohen, stated that the current Cable Act's provisions for local franchising requirements were important to be retained. In published remarks in 2005, Mr. Cohen stated, "The debate seems to be that local franchising is about barriers to competitive entry. Last time I checked, that is not what Congress was doing when they created a franchise obligation in (federal law). There were important policies of localism that could best be protected through a constrained franchising process." Manatee County agrees with Comcast's position. Indeed, on need look no further than the Cable Act to know Congress grants a strong role to local authorities in the area of wire-line cable television. The Cable Act itself states, in relevant part:

> Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter [nor] to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.

47 U.S.C. § 556(a)&(b). Any FCC rule which would reduce the valid exercise of the LFAs' Congressionally-granted authority would thus be a departure of the FCC's own Congressional mandate in the field of cable television.

Is the Local Franchising Process Unreasonably Causing Refusals of Competitive Franchise Grants?

The FCC's NPRM states that "the abilities to offer video to consumers and to deploy broadband networks rapidly are linked intrinsically" and that potential new entrants have complained that local franchising processes are unreasonable barriers to entry.

As to the issue of the "intrinsic linkage" between network deployment and the ability to offer a video product to consumers, Manatee County asserts that this linkage is not quite as intrinsic as the FCC and the potential new entrants would contend. It is clear in the NPRM that the new entrants at issue in the NPRM are the former Bell Companies, including Verizon and SBC. It is also beyond dispute that these companies, as telephone companies, have the legal right and ability, at least in Florida, to deploy an advanced network with video delivery capability even without a local cable franchise grant. Indeed, Verizon has been working at a strong pace throughout the Nation, including the greater Tampa Bay area, to deploy its FTTP network even without having yet obtained video franchises from many of the LFAs in the communities in which they are building. In those communities, it can market and use this network to bring its phone and high-speed data products to consumers, and include, as it ultimately will, its wireless product in the bundle. Its video product can join that bundle as Verizon obtains franchise agreements, but there is no legal impediment to construct and begin deriving income from its advanced system while it negotiates video franchise agreements with LFAs. In point of fact, it can be argued that the Bells have an easier time entering a market since traditional wire line cable companies who are not regulated phone companies with independent right of way authority cannot even begin system construction until the successful end of a franchise negotiation process. Indeed, the Bells have already had a video option to offer to customers as part of a package deal with the partnerships with satellite video providers they have entered. While these video offerings were not wholly owned by the Bells, they did and still do provide a video option for the Bells to market to customers should they not desire to offer a wire-line product of their own.

The NPRM also recounts that the FCC has been told by the Broadcaster Service Providers Association (BSPA) that "the local franchising process is serving as an unreasonable barrier to entry," citing build out requirements as "inherently anticompetitive" because, in most instances, "the incumbent has had decades to build, upgrade and expand its network with limited or no competition."

As to this assertion, Manatee County would note that the FCC has found that the vast majority of the Nation is served by incumbent providers who *do* face effective competition and have for years. Thus, the BSPA's argument that incumbents have not suffered competition is directly contrary to the FCC's own effective competition orders. But more to the point, Manatee County has offered the Commission real actual evidence that build out requirements in fact *do* help competition. Indeed, the General Accounting Office's most recent study on overbuilt communities found significant rate benefits to consumers in communities where an overbuild had occurred. What the BSPA is really trying to say isn't that build out requirements are anti-competitive (that is to say anti-consumer-friendly), but that they prevent profit optimization by denying new entrants the ability to 'cherry pick' or 'red line' communities, selecting only those areas where high-margin customers may reside. While it is true enough that incumbent providers often have enjoyed no wire-line competition in many communities thus allowing them to have obtained greater profit margins and more extensive system builds, it is equally true, particularly after the deregulatory Communications Act of 1996, that new entrants can now obtain multiple profit streams (voice, data, video, advertising, etc.) from a single system, an aspect of business not available to many legacy operators without essentially re-building their own systems for digital capacity. Further, the concept of "barrier to entry" does not equate to what a particular provider deems a desired rate of return on investment. When Verizon was still GTE, it elected to launch a cable television operation (GTE Media Ventures) and overbuild several communities including communities in Pinellas County, Florida. While it abandoned cable operations after the merger that created Verizon, the Pinellas system was never shut down for being unprofitable and indeed still operates to this day, and as noted earlier contributes to rate stability in that County. LFAs must be permitted to sift through the various providers that may wish to franchise themselves and thus use limited right of way space and be able to select those providers who will bring the strongest level of commitment to serve the entire community. For instance, Manatee County occasionally receives informal inquiries asking if it grants franchises for just one subdivision or development (usually the entity simply desires to obtain an exclusive bulk agreement from the developer of an as yet uninhabited pending development). Such applications do nothing to bring competition to a market. Since Manatee County desires to have providers who are willing to provide broader competition it will usually not look favorably on such applications. When presented with the likelihood that some form of build out would be desired, the provider will either decide not to apply, or, as was the case with STI and Verizon, will work with the County to examine how competition in the marketplace can be aided by the applicant through a system build out requirement customized to make sense for that time and place in the Manatee County market, and which does not unduly burden the provider. Since Manatee's dominant incumbent provider has historically provided residents exemplary service levels, even if at higher prices than in Pinellas, why would Manatee favor an additional unproven franchise applicant who expresses absolutely no desire to help bring competition to its market? And why would the United States government find it necessary for Manatee to do so?

Given this discussion, it should be clear that any "barrier to entry" build out requirements may create are inherently *reasonable* and based upon Congress's desire for the creation of true competitive market conditions and a Congressionally-mandated duty that LFAs properly manage limited right of way space and ensure certain members of the community are not denied access to service due to their race or income levels. Should the Manatee County market evolve such that in the future almost every household in the County has access to at least two wire-line providers, then obviously Manatee County would de-emphasize build out requirements as a public policy. And should some community attempt to impose a build out requirement that is truly unreasonable (say where a city requires all seven of its franchisees, regardless of circumstances, to overbuild each other fully where the market clearly would not support such expense), the judiciary can so find, upon a properly established record, via existing law. But an FCC rule removing all local authority to impose customized forms of system build outs across the Nation would only serve to ensure that such evolution in Manatee's market (and the Nations market) would never occur.

The next contention in the NPRM to be addressed, which is attributed to Verizon, is Verizon's contention that the overall local franchising process "forces a new entrant to telegraph its deployment plans to the incumbent video competitor" which would then allow "the incumbent not only to take steps to prolong the franchise process and delay the onset of competition, but also to entrench its position in the market..."

As to this set of contentions, Manatee County would first respond by observing that in its experience being a manager of its publicly-owned/controlled right-of-way and any construction therein, it would be virtually impossible for a new wire-line entrant's system construction not to "telegraph its deployment plans" when it files for construction permits. Next, Manatee County notes that it has been Verizon's consistent position to Tampa Bay's LFAs with which it is dealing, with respect to its FTTP project (through which it will deliver its FiOS television service), that it is constructing the system primarily as a telephone system, not subject to cable television franchise authority. Verizon therefore argues (and Manatee County finds no authority to the contrary) that it may begin FTTP system construction at will, even in communities where it is not actively seeking a cable television franchise, because the system will be used to provide voice and data services (not regulated by cable television ordinances) regardless of a cable franchise. Further, as to this issue, Manatee County does not believe there will be any great mystery in how Verizon will develop deployment plans. Any large, sophisticated corporation such as Verizon will look to construct its new FTTP system in those markets where it has the most significant current phone and data customer base, where population density makes an acceptable level of market penetration more likely, where a majority of the population do not live under long-term exclusive bulk agreements with a competitor, and where, as in Manatee County, the LFA's stated policy is to encourage and welcome competition. Indeed, even in Texas, where Verizon now has authority to operate state-wide, it has no publicly-announced near-term plans to construct its FTTP system throughout the entire State. In sum, new entrants such as Verizon, with multi-use systems legally able to be constructed prior to even applying for a cable franchise, local cable television franchising requirements will have very little impact on revealing the future cable television deployment business plans of those entrants.

Finally, Manatee County wishes to respond to the concern that the local franchising process allows an incumbent to take steps to prolong the franchise process and entrench its position in the market. In Manatee County's own experience working with Verizon to obtain a cable television franchise, it was indeed the case that incumbent providers expressed exacting concern over Verizon's application. The County's Verizon negotiation files were subject to regular public records requests and the incumbents provided several critiques of the various franchise drafts during the process. The management officials of the incumbents also partook of their companies right to petition their government by making full presentations at all public hearings concerning Verizon, and by seeking individual private meetings with elected officials to convey their various positions and concerns. The Manatee County Board of County Commissioners uniformly expressed appreciation to all representatives who provided such appearances as they assisted the Commissioners in the performance of their duties as the governing body of the LFA. Indeed, the County Commission granted the incumbent providers a small delay to ensure for itself that all comments and concerns would be at least fully heard by the County's negotiation team prior to proceeding to the public hearings. However, when the questions got down to mere policy decisions, the County Commission proceeded to the public hearing stage, and made its policy decisions, ultimately resulting in the grant of a franchise to Verizon. Manatee County would assert that while this process certainly isn't as smooth as simply being allowed to do business in the public right-of-way as a matter of right, it did serve to ensure the local issues of interest to the County, Verizon, and the incumbents were fully aired, yet within a timeline not unreasonable and not outside of the historically-typical timeline for similar cable franchise negotiations. As for the fear that incumbent providers will use the time between application for a franchise and the grant to entrench themselves in the local market, Manatee County responds that such behavior is not illegal and indeed would seem to be in conformity with the business interests of the owners of such incumbents. Such efforts also often result in greater benefits to consumers, such as where incumbent providers freeze or lower prices in preparation for the entry of the new competitor. In Manatee County, dominant incumbent Bright House, for example, just announced its price increases for 2006. They are distinctly less than in years past, and Bright House has constructed a loyalty program granting price stability for longer periods for consumers willing to sign longer-term agreements with it. In anticipation of Verizon's launch in the Tampa Bay area, Bright House has also been increasing the speed of its data service, branded as RoadRunner, and has sought to beef up its unique local offerings, such as specialty channels dedicated to the USF Bulls and the Tampa Bay Lightning NHL team. It can be debated as to whether Bright House would have launched these enhancements had Verizon not begun efforts to serve the Tampa Bay area with a cable television product, but it cannot seriously be debated that Bright House would have taken these steps in response to pending competition regardless of the fact that Verizon had to file local franchise applications. If the FCC has any doubt as to this point, it only need examine how incumbent providers are reacting to Verizon's entry into their communities in Texas, where Verizon has a statewide franchise. The competitive reaction to incumbents there, in terms of efforts to entrench themselves in their markets, is no different than in Florida, where LFA franchising still exists.

Verizon's comments to the FCC also contend that the local franchising process "simply takes too long" due to inertia, arcane application procedures, bureaucracy or inattentiveness by LFAs. Verizon observed that it would have to negotiate with 10,000 LFAs in order to offer video service in its current service area. BellSouth's comments state that while the average agreement takes 11 months to negotiate, some negotiations have lasted 3 years.

Here, Manatee County has some sympathy with Verizon. It cannot be denied that many LFAs, who have not had the prospect of a competitive provider for decades, have not paid much attention to their cable television franchising processes. They have historically enjoyed a congenial relationship with the incumbent, and negotiations were often pro forma, with all sides happy with the prevailing business terms. Indeed, it is highly likely that many LFAs still have provisions on their books that have long been superceded by changes in law or technology. As one example, Manatee County is aware that some jurisdictions still require disclosure of an applicant's program lineup prior to proceeding with an application, even though LFAs have not been granted authority over the content of providers by Congress. While such information is reasonably sought by LFAs along the franchising way, so for instance that their staff can better respond to citizen complaints or inquiries about provider content, an entire application process should not be held up for want of a program lineup, which new entrants such as Verizon may not yet have fully developed and which they may desire to keep under wraps for competitive and marketing reasons. Additionally, since cable television franchising is a process not often engaged in by LFAs, many LFAs, particularly smaller ones, do not possess adequate in-house staff with the technical and legal expertise to effectuate speedier negotiations. When this is added to a high level of political and legal scrutiny of an application by the incumbent provider, delay can indeed result. However, Manatee County notes that many LFAs in given regions maintain fine relations with each other and often jurisdictions with more experience will lend help or input to those jurisdictions which may so request. Manatee County has, for instance, held numerous sessions with various municipal and county governments in the Tampa Bay region, relaying its experiences working with Verizon, and suggesting methods to move the process along. As noted earlier in these Comments, Manatee County believes that LFAs should look closely at formalizing joint franchising efforts through interlocal agreements where the political climate will allow. Indeed, as the various states look at this issue, they may decide rather than adopting a Texas-style system, to mandate regional agreements for franchising, as is now done with transportation policy via regional Metropolitan Planning Organizations. The individual states, however, should be allowed to set their own courses concerning these matters as one solution may work better for one state than another for various reasons such as geographic compactness. Finally, as to Verizon's contention that it will need to negotiate with 10,000 LFAs in its service area, this would appear, with due respect, to be somewhat of a red herring. Few cable television providers seek to serve all communities they actually could given their presence in particular areas of the Country. They all take into consideration the cost of system expansion vs. the ability to obtain desired customer counts. This is why, for instance, several North Florida communities, long ignored by wire-line cable operators, have been seeking to establish municipally-run systems to help their rural communities step into the world of digital communication and entertainment. Indeed, as noted, Verizon is now legally authorized to serve every community in Texas. Yet it has no published plans to lay its FTTP network throughout every small Texas town in spite of that legal authority, at least in its near term rollout. In Florida, Verizon will be able to reach a significant number of the population by dealing with a relative few LFAs with jurisdiction over the State's various areas of dense population. It appears to be employing this strategy by focusing its efforts on certain jurisdictions in Tampa Bay. It is currently talking, for instance, with Hillsborough County and the City of Tampa and already has an agreement with the City of Temple Terrace. These collective Hillsborough County communities will bring most of the over one million Hillsborough residents under Verizon's cable television reach.

Verizon next contends that local franchising requirements can result in "outrageous demands by some LFAs" wholly unrelated to video services or franchising rationale.

In this regard, Manatee County, by its staff's own personal observation, will readily concede that there can be some communities who still try to view cable franchising as a means to extract improper concessions. Manatee County contends that any LFA which attempts to use its authority over granting cable television franchises to extract the construction of a new city hall or a new BMW for each elected official should be strongly dealt with by a reviewing court. However, Manatee County and the vast majority of its fellow LFAs are not in this category. Manatee County is proud of the fact that its staff and elected officials are educated as to the purposes of its Congressionally-granted franchising authority, and to that authority's limits. Manatee County has never sought to extract any concession from any provider not tied to that authority. Indeed, as the earlier review of Manatee County's franchising process with Verizon makes clear, the parties were able to negotiate in good faith over the exact levels of support to be provided to the County (the "business terms"), and part of that process was the County's willingness to set forth its justifications for the requests being made. Manatee County was very pleased with Verizon's willingness to work with it on these points and while it of course did take some time to negotiate, the resulting terms were in no way unreasonable.

Manatee County would observe, in this context, that some providers contend that they are not required to provide any level of support not supported by some detailed study by consulting experts. No provision of law requires this level of exactitude. Rather, it requires that the elected officials hear from all interested parties, and make a balanced judgment as to what level of support will be required, taking into account the LFA's future cable-related community needs and the provider's ability to make a reasonable profit on its investment in the community. The ability to reach agreeable, customized agreements on business terms to address future cable-related community needs can result in positive outcomes. For instance, while Comcast did, as mentioned earlier, try to resist San Jose's support requests via a premature suit, that company also has in the past few years been able to agree to many support packages beneficial to the communities it negotiates with. For instance, in the past few years it has agreed to provide an I Net for Modesto, California and, in an extension agreement with King County, Washington, to provide substantial monetary support, 18 digital access channels, and 6 MHz of data bandwidth for County use, since Comcast satisfied itself that these provisions were really going to be used for proper purposes by the jurisdictions and because they were acceptable expenses to bear given the market size at play.

Manatee County suggests that rather than asking the FCC to adopt some sweeping rule removing LFA authority over customizing local support, providers who feel they are aggrieved by improper support requests move on toward obtaining a denial from the LFA then taking that LFA to court over the unreasonable request. Manatee County feels certain that few LFAs who truly are asking for an improper item of support would risk such a judicial proceeding and thus back off the request. While a blanket FCC preemption would certainly be easier for providers, it would be using a blunt instrument to cure what are surely only a small minority of misbehaving LFAs.

Conclusions

The Commission's NPRM states, at ¶ 10, that it seeks "to determine whether, in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the Act or are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment..." Manatee County respectfully submits that at least in its own experience, the answer is the former, rather than the latter, and that it is ready and able to process applications in a timely manner.

As to the Commission's question concerning how the cable marketplace has changed since the passage of the 1992 Act, the County contends, at least from its own experiences and observations, that one of the most significant changes has been that most new residential development is occurring within planned communities where developers or association boards often enter exclusive long term bulk agreements. Manatee County feels that the Commission and Congress should attempt to revisit the issue of promotion of competition to take into account this growing method of video product sales, and in so doing preserve the authority of LFAs to attempt to tailor solutions to fit their local markets as Manatee's new ordinance has.

As to the NPRM's question concerning level-playing-field statutes and whether they create unreasonable regulatory barriers or comparability among providers, this question has already been considered and rejected by the courts. For instance, in ***Cable TV Fund 14-A, LTD, d/b/a Jones Intercable v. City of Naperville*, 1997 WL 280692 (N.D. Ill. 1997)**, the Court provided an extensive analysis and review of the argument that the Illinois Overbuild (Level Playing Field) Act should be preempted by § 541 as inconsistent with federal law and provided an obstacle to accomplishing the objectives of Congress. The ***Naperville*** Court that the level-playing-field statute

> does not inhibit competition by excluding potential competitors. Rather, the Overbuild Act is designed to ensure fair competition, a goal that certainly does not conflict with [the] pro-competitive purpose of the Cable Act.

***Naperville*, at *16**. The Court found "not without merit" the argument that such level playing field laws actually promote the Cable Act's goal of fair competition since,

> without the Overbuild Act, a local authority could provide a preferred new operator with terms sufficiently more favorable or less burdensome to enable the new operator to consistently undercut the existing operator until it drove the incumbent operator out of the business.

Id., at n. 18. The ***Naperville*** Court went on to observe that nothing in the Cable Act or its legislative history evidenced a congressional intent to "upset the traditional spheres of state and federal power" and that Congress's rejection in the 1992 amendments of any specific list of reasonable grounds for denial of a franchise demonstrated its intent "to leave states with the power to determine the bases on which to grant or deny additional franchises, with the only caveat being that the basis for denial must be "reasonable." **Id., at *16**. The Court observed that at the time Congress was considering the 1992 amendments, which included § 541, there were several "level-playing-field" laws already in effect and Congress could certainly have expressly preempted them if it had intended to prevent states from denying additional franchises based upon such laws. **Id., at n. 19**. The Court went on to conclude that

> it is certainly reasonable for the state to mandate denial of an additional franchise when the potential competitor is only willing to compete unfairly, pursuant to a franchise that, taken as a whole, contains terms more favorable or less burdensome than those in the existing franchise.

Id., at *16. Manatee County asserts that Florida's level playing field statute is flexible enough to permit LFAs to allow the entry of new providers such as Verizon. Indeed, LFAs should come to understand that the entry of a new provider into a market with a legacy franchise issued long ago will provide that LFA with a fresh opportunity to establish a new level playing field standard which the incumbent would then be expected to meet when its current franchise expires. In any event, Manatee County doubts that the major national players now seeking to enter the video market would resist reasonable, factually supported requests, based on level playing field concepts or not. As to the use of a level playing field statue to force a universal build out from a new entrant, Manatee County believes that LFAs should consider carefully whether such a requirement would really best serve the market's competition needs, but in the end the County strongly believes that each LFA must retain the authority to require at least some build out where the community is not otherwise served by more than one wire line provider.

As to the Commission's tentative conclusion, as stated in ¶ 15, et seq., of its NPRM, that it "has authority to implement [§ 541(a)(1)]'s directive that LFAs not unreasonably refuse to award competitive franchises," Manatee County simply does not agree and its Board of County Commissioners would oppose any attempt by the Commission to adopt rules which remove its Congressionally-awarded and state-statute-confirmed cable television franchising authority. An attempt to read Congressional law as bestowing Commission jurisdiction to directly implement § 541(a)(1) is textually unsupported and inconsistent with the explicit enforcement jurisdiction placed in the hands of the federal judiciary. Of perhaps even more concern, Manatee County believes the Commission's morphing of the "unreasonably refuse" standard announced by Congress into an "unreasonably interfere with the ability to provide" standard, which does not even have a legislative committee discussion record to help guide vested parties and the courts, would be found on judicial review to be a departure from agency authority. While Manatee County of course recognizes and respects that body of law observing the deference given to agency rules, an agency cannot create a new standard of whole cloth but must be authorized by Congress, which is the policy-making body of this Nation. Congress's clear, explicit and oft-stated policy concerning LFA franchising action is that absent ordinance provisions facially preempted by federal law, it be judged after final denial of individual applications, not before. Indeed, Congress *did* know how to create an "unreasonable barrier" standard related to communications when it did so concerning wireless towers in the 1996 Act. That it did not do so for local cable regulations in the same Act supports the County's position on the issue of the Commission's authority.

Concerning the Commission's question, in ¶ 24 of the NPRM, whether it may be appropriate for the Commission to preempt state-level legislation to the extent that it serves as an unreasonable barrier to the grant of franchises, the Board of County Commissioner's formal position is that it opposes any state legislation which would create a Texas-style statewide franchise grant statute unless such legislation fully protected the ability of local government LFAs to ensure future local cable related community needs were satisfied. It has taken no position on the level-playing-field statute other than that expressed earlier herein. In any event, its overall view of the authority of the Commission to adopt rules in this area is that the Commission has no authority to preempt state statutes as the NPRM suggested.

Finally, Manatee County strongly agrees with the Commission's tentative conclusion, in ¶ 20 of its NPRM, that it is not unreasonable for an LFA, in awarding a franchise, 1) to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides; 2) allow a cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area, and 3) require adequate assurance that the cable operator will *provide adequate access channel capacity, facilities, or financial support.*

Manatee County is concerned that its authority as an LFA not be decreased, either by FCC rule or by the Florida Legislature, as happened in Texas (as of the date of the filing of these Comments, a "Shell Bill" has been filed for the current session of the Florida Legislature which is understood to be a Verizon-sponsored Bill which will aim to reduce or eliminate local franchising). Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that our local community's specific needs are met and that local customers are protected.

In light of the foregoing, Manatee County respectfully requests that the Commission do nothing to interfere with local government authority over franchising or to otherwise impair the operation of the local franchising process as set forth under existing federal law with regard to either existing cable service providers or new entrants.

Respectfully submitted this 3rd day of January, 2006,

Manatee County, Florida

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